Chapter § 1 Introduction

Amici curiae skyrocketed to international fame in the late 1990 after the WTO Appellate Body decided in *US–Shrimp* that panels possessed an unwritten authority to accept submissions from non-governmental organisations lobbying for the inclusion of environmental standards in trade disputes.[1] The admission by investment arbitration tribunals of equally unsolicited *amicus curiae* submissions by non-state actors a few years later firmly entrenched the issue on the agenda of trade and investment law practitioners.[2] In the heat of the debate, few realized that *amicus curiae* participation was quite common before many other international courts and tribunals. The ECtHR, the IACtHR and most international and hybrid criminal tribunals had a thriving *amicus curiae* practice, and even the ICJ and the IUSCT had had (admittedly few and sporadic) encounters with the concept.

What is *amicus curiae*? Latin for 'friend of the court' the term indicates that *amicus curiae* is an instrument for the benefit of the court, that it assists it in some manner – with the term 'friend' indicating that it is not obliged to do so. An often-quoted entry in Black's Law Dictionary defines *amicus curiae* as '[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.'[3] This view is not unchallenged. Some require *amicus curiae* to act as an uninterested and neutral assistant.[4] Others see *amici* as lobbyists of their own, a public

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1 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (hereinafter: *US–Shrimp*), Report of the Appellate Body, adopted on 6 November 1998, WT/DS58/AB/R, para. 83.

2 *Methanex Corporation v. United States of America* (hereinafter: *Methanex v. USA*), Decision of the Tribunal on Petitions from Third Persons to Intervene as *'Amici Curiae'*, 15 January 2001; *United Parcel Service of America Inc. v. Canada* (hereinafter: *UPS v. Canada*), Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, 17 October 2001.

3 B. Garner, *Black's law dictionary*, 7th Ed., St. Paul 1999, p. 83.

4 G. Umbricht, *An "amicus curiae brief" on amicus curiae briefs at the WTO*, 4 Journal of International Economic Law (2001), p. 778 (*Amicus curiae* is 'a private person or entity who has no direct legal interest at stake in the dispute at hand [and]

or the parties' interests.[5] The plethora of views held in academia (and in national legal systems) is reflected in the practice of international courts and tribunals. With the exception of the IACtHR, international courts and

may submit an unsolicited report to the court in which such person or entity may articulate its own view on legal questions and inform the court about factual circumstances in order to facilitate the court's ability to decide the case.'. [References omitted].); *The Prosecutor v. Kanyarukiga*, Case No. ICTR-2002-78, Decision on *amicus curiae* request by the Kigali Bar Association, 22 February 2008, Rec. No. ICTR-02-78-0091/1, para. 7 ('[J]urisprudence indicates that the role of an *amicus curiae* is not to represent the interests of a particular party, but rather to assist the court by providing an objective view in relation to the issues under consideration.'); P. De Cesari, *NGOs and the activities of the ad hoc criminal tribunals for former Yugoslavia and Rwanda*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 119 ('If the authorization does not indicate exactly the amount of information required, the NGO must try not to broaden the scope of its opinion ... Leave is normally granted for technical and limited support and not recommendations or suggestions. The aim of *amicus curiae* participation is to assist the judicial process and not to attempt to put pressure on it.').

5 P. Mavroidis, *Amicus curiae briefs before the WTO: much ado about nothing*, in: A. v. Bogdandy et al. (Eds.), *European integration and international coordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann*, The Hague 2002, p. 317; C. Brühwiler, *Amicus curiae in the WTO dispute settlement procedure: a developing country's foe?*, 60 Aussenwirtschaft (2005), p. 348 ('[T]oday's *amici* try to highlight factual or legal aspects associated with their specific concerns or interests.'); M. Frigessi di Rattalma, *NGOs before the European Court of Human Rights: beyond amicus curiae participation*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 57 ('[A]n *amicus curiae* is a person or organization with an interest in or view on the subject matter of a case who, without being a party, petitions the ECHR for permission to file a brief suggesting matters of fact and of law in order to propose a decision consistent with its views. The interest of an *amicus* tends to be of a general nature, such as the desire to promote public interests.'); Y. Ronen/Y. Naggan, *Third parties*, in: C. Romano/K. Alter/Y. Shany (Eds.), *The Oxford Handbook of international adjudication*, Oxford 2014, p. 821 ('Broadly defined, *amici curiae* are natural or legal persons who, without being parties to the case, submit their views to the court on matters of fact and law, in the pursuit of a public interest related to the subject matter of the case.').

tribunals largely have abstained from defining the concept and its functions.[6] Overall, the term *amicus curiae* is vague and unclear.[7]

Despite these uncertainties, many NGOs support the notion of *amicus curiae* participation in international dispute settlement. The concept is lauded as an opportunity to introduce public values into trade and investment-focused legal regimes whose dispute settlement processes are said to operate so effectively as to stymie national measures issued by democratically elected governments and parliaments in the public interest.[8] Many scholars and NGOs argue that some form of participation for affected individuals and communities is indispensable to ensure the continued legitimacy of international adjudication. They welcome *amicus curiae* as an agent of change from a state-focused to a peoples-focused dispute settlement system where the selective espousal of national interests by states can be mitigated by this form of direct participation.[9]

However, not all view the instrument positively. Many states and international practitioners on and before the benches worry that its involve-

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6 Exception: *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic* (hereinafter: *Suez/Vivendi v. Argentina*), Order in Response to a Petition for Participation as *Amicus Curiae*, 19 May 2005, ICSID Case No. ARB/03/19, para.13. See *also The Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2001-67-I, Decision on ADAD's (The organisation of ICTR defence counsel) motion for reconsideration of request for leave to appear as *amicus curiae*, 1 July 2008, para. 10, where the ICTR emphasizes that *amicus curiae* participation is at the discretion of the Chamber and that it serves to assist the Chamber 'in its consideration of the questions at issue, and in the proper determination of the case before it.' But see *Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, Decision on the *Amicus Curiae* Application by the Government of the Kingdom of Belgium, 6 June 1998, where the ICTR found that an *amicus* may have 'strong interests in or views on the subject matter before the court.'

7 C. Tams/C. Zoellner, *Amici Curiae im internationalen Investitionsschutzrecht*, 45 Archiv des Völkerrechts (2007), p. 220 (‚Der Begriff *amicus curiae* ist schillernd und wird vielfach verwendet.'); J. Bellhouse/A. Lavers, *The modern amicus curiae: a role in arbitration?*, 23 Civil Justice Quarterly (2004), p. 187.

8 R. Higgins, *International law in a changing international system*, 58 Cambridge Law Journal (1999), p. 85.

9 CIEL, *Protecting the public interest in international dispute settlement: the amicus curiae phenomenon*, 2009, p. 2 ('Given that decisions rendered by international courts and tribunals increasingly affect a myriad of public interest issues, there is a need to ensure that those dispute resolution bodies do not view the cases before them in an artificially myopic manner, but that they adequately consider the context and social implications of, and the interests affected by, the cases before them.' [References omitted].).

ment places an unjustifiable burden on the parties. They fear that the admission of *amici curiae* ruptures the delicate compromise represented in international treaties on what international courts and tribunals decide on and in which manner.[10] Others fear a blurring of the primary function of dispute settlement: the rendering of a workable and acceptable solution of the parties' dispute. The issues *amici curiae* seek to table are often viewed as potentially further antagonizing the parties and impeding 'the complex process of interest-accommodation that third party dispute settlement inevitably entails.'[11] Concerns are not limited to procedural matters: it is argued that the WTO and investment treaties have been drafted technically to keep politics out of the proceedings and to ensure a smooth functioning of the global trade system. Allowing *amici* to participate in adjudicative proceedings, many fear, might repoliticize disputes and, in the worst case, limit trade and foreign direct investments.[12]

In short, the issue of *amicus curiae* raises not only intricate procedural questions, but it engages the fundamental purpose of international dispute settlement in today's globalizing world.[13] The issue's relevance is augmented in light of the ever-increasing importance of international dispute settlement, which is reflected in the growth in number of international courts and tribunals and the cases brought before them.

Hence, it is not surprising that in the last fifteen years the instrument has become the subject of extensive academic interest. Research has focused largely on analyses of *amicus curiae* before individual adjudicating bodies, especially the WTO dispute settlement system and investor-state arbitration. To date, there is no comprehensive study of *amicus curiae* before international courts and tribunals examining its role and accommoda-

10 For many, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, Separate Opinion Judge Buergenthal, ICJ Rep. 2003, p. 279, para. 22.

11 A. Bianchi, *Introduction*, in: A. Bianchi (Ed.), *Non-state actors and international law*, Farnham 2009, p. xxii.

12 WTO General Council, *Minutes of Meeting* of 22 November 2000, WT/GC/M/60, Statement by Brazil, para. 46.

13 T. Treves, *Introduction*, in: T. Treves et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 1-2 ('[I]ncreased weakness of the dogma that the state is the only actor in international relations'). See also R. Mackenzie/C. Romano/Y. Shany/P. Sands, *Manual on international courts and tribunals*, 2nd Ed. Oxford 2010, p. xv.

tion in international proceedings, its effectiveness and its effect on international dispute settlement.[14] This contribution seeks to close this gap.

The aim of this study is twofold: first, to obtain a deeper understanding of *amicus curiae* before international courts and tribunals: its characteristics, its functions and how it is dealt with. The second aim is to examine if the concept, as currently used and regulated, is of added value to international dispute settlement.

A. Structure

The main decision concerning the structure of this study was whether to examine *amicus curiae* before each international court and tribunal[15] separately or to approach the different issues topically. The latter approach was chosen to allow for direct comparisons and keep the focus on the instrument and not on the particularities of a certain international court or tribunal, although they determine much of the role and development of *amicus curiae* in each court.

This book is structured in three parts. The first part, Chapters 2-4, sketch the international *amicus curiae*. Chapter 2 presents the above-indicated presumed functions and drawbacks of *amicus curiae* participation in order to provide a backdrop against which to assess the instrument throughout this book. Chapter 3 examines the national law origins and the development of the instrument before international courts and tribunals to show the variety of concepts held of *amicus curiae* in national legal systems and to highlight the different settings and conditions under which

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14 Several studies of *amicus curiae* served as starting points for this study. Two articles were of particular value: an article by *Lance Bartholomeusz* published in 2005, which constitutes the most comprehensive study of the concept so far, and a book chapter authored by *Christine Chinkin* and *Ruth Mackenzie*. See L. Bartholomeusz, *The amicus curiae before international courts and tribunals*, 5 Non-State Actors and International Law (2005), pp. 209-286; C. Chinkin/R. Mackenzie, *International organizations as 'friends of the court'* in: L. Boisson de Chazournes et al. (Eds.), *International organizations and international dispute settlement: trends and prospects*, Ardsley 2002, pp. 295-311.

15 This is usually done, see L. Bartholomeusz, supra note 14; D. Hollis, *Private actors in public international law: amicus curiae and the case for the retention of state sovereignty*, 25 Boston College International and Comparative Law Review (2002), pp. 235-255; A. Lindblom, *Non-governmental organisations in international law*, Cambridge 2005.

amici curiae were first admitted. Chapter 4 distils the current characteristics and functions of *amicus curiae* before international courts and tribunals and delineates it from other forms of non-party involvement in international dispute settlement.

The second part of this book examines the laws and practices of *amicus curiae* participation before international courts and tribunals. It forms the empirical and analytical foundation of the study. Chapter 5 explores the legal bases for *amicus curiae* participation and its admission to the proceedings. Chapter 6 examines the instrument in the proceedings, including the modalities of participation, the formal and substantive requirements attached to submissions and their content.

The third part of this book, Chapters 7-8, drawing from the examination in the second part, addresses the second aim of the study: the added value of *amicus curiae* participation. Chapter 7 explores the substantive effectiveness of the concept. It evaluates how and to what extent international courts and tribunals have relied on submissions in their decision-making. Chapter 8 analyses the effect of *amicus curiae* on international dispute settlement as such. In particular, it considers whether the concept has fulfilled the positive and/or negative expectations surrounding it.

B. Methodology

This study pursues an analytical approach. Normative considerations only play a role when analysing the sufficiency of current regulations. The focal point of this study is the law *de lege lata*.

The research is based on the laws and cases of the included international courts and tribunals, academic literature and select *amicus curiae* submissions. Unless indicated otherwise, the statutes, procedural rules and other international treaties referred to are those applicable as of 15 November 2016.[16] The corpus of case law of each court was researched

16 United Nations, Statute of the International Court of Justice, entered into force 18 April 1946 (hereinafter: *ICJ Statute*); International Court of Justice, Rules of Court, entered into force 1 July 1978 (last amendment entered into force 14 April 2005) (hereinafter: *ICJ Rules*); International Court of Justice, Practice Directions, first adopted October 2001, and last amended on 21 March 2013 (hereinafter: *ICJ Practice Directions*), all at: http://www.icj-cij.org/en/practice-directions (last visited: 28.9.2017); United Nations Convention on the Law of the Sea of 10 December 1982, entered into force 16 November 1994 (hereinafter: *UNCLOS*) at: http://www

with a view to identifying cases with *amicus curiae* participation. This

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.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (last visited: 28.9.2017); Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea, entered into force 16 November 1994 (hereinafter: *ITLOS Statute*), at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf (last visited: 28.9.2017); Rules of the International Tribunal for the Law of the Sea (ITLOS/8), adopted on 28 October 1997 (last amendment 17 March 2009) (hereinafter: *ITLOS Rules*), at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf (last visited: 28.9.2017); European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, and as entered into force with the latest amendment on 1 June 2010 (hereinafter: *ECHR*), at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited: 28.9.2017); European Court of Human Rights, Rules of Court, adopted 18 September 1959 (last amendment entered into force 14 November 2016) (hereinafter: *ECtHR Rules*), at: http://www.echr.coe.int/Documents/Library_2015_RoC_ENG.PDF (last visited: 28.9.2017); Statute of the Inter-American Court of Human Rights, adopted by the General Assembly of the Organisation of American States by Resolution No. 448, entered into force on 1 January 1980 (hereinafter: *IACtHR Statute*), at: http://www.corteidh.or.cr/index.php/en/about-us/estatuto (last visited: 28.9.2017); Inter-American Court of Human Rights, Rules of Procedure, as approved by the Court at its LXXXV Regular Period of Sessions, from 16-28 November 2009 (hereinafter: *IACtHR Rules*), at: http://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf (last visited: 28.9.2017); African (Banjul) Charter on Human and Peoples' Rights, entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 (hereinafter: *African Charter*), at: http://en.african-court.org/images/Basic%20Documents/charteang.pdf (last visited: 28.9.2017); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, at: http://en.african-court.org/images/Basic%20Documents/africancourt-humanrights.pdf (last visited: 28.9.2017); African Court on Human and Peoples' Rights, Rules of Court, as entered into force on 2 June 2010 (hereinafter: *ACtHPR Rules*), at: http://en.african-court.org/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf (last visited: 28.9.2017); Practice Directions, as adopted at the Fifth Extraordinary Session of the Court, held from 1-5 October 2012 (hereinafter: *ACtHPR Practice Directions*), at: http://en.african-court.org/images/Basic%20Documents/Practice%20Directions%20to%20Guide%20Potential%20Litigants%20En.pdf (last visited: 28.9.2017); World Trade Organization, Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement (hereinafter: *WTO DSU*), at: https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last visited 28.9.2017); WTO Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/6, as entered into force on 15 September 2010, at: https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm (last visited 28.9.2017); International Centre for the Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of

was necessary given the lack of a full set of current data before all of the courts examined.[17] A list of all cases with *amicus curiae* practice that were included in this study is annexed to this book (Annex I). Judgments and decisions rendered before or on 15 November 2016 were considered. The laws and practices of each court were compared based on the methods of comparative law.[18] Although traditionally defined as an area of law that compares foreign national laws, these methods are applicable to the comparison of the practices and laws of international courts and tribunals on the assumption that each court perceives the others courts' laws and practices as alien.[19]

Other States, as amended and effective 10 April 2006 (hereinafter: *ICSID Convention*), at: https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx (last visited 28.9.2017); ICSID Arbitration Rules, entered into force on 1 January 1968 (last amendment entered into force 1 January 2003), at: https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Arbitration-Rules.aspx (last visited: 28.9.2017); United Nations Commission on International Trade Law Arbitration Rules, with new article 1, paragraph 4, as adopted in 2013 (hereinafter: *2013 UNCITRAL Arbitration Rules*), at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf (last visited: 28.9.2017); UNCITRAL Arbitration Rules, as revised in 2010 (hereinafter: *2010 UNCITRAL Arbitration Rules*), at: http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last visited: 28.9.2017); UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, as entered into force on 1 April 2014, (hereinafter: *UNCITRAL Rules on Transparency*), at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html (last visited: 28.9.2017).

17 For a set of data on NGOs appearing as *amicus curiae* before the ECtHR, see L. Van den Eynde, *An empirical look at the amicus curiae practice of human rights NGOs before the European Court of Human Rights*, 31 Netherlands Quarterly of Human Rights (2013), pp. 271-313.

18 See K. Zweigert/H. Kötz, *Introduction to comparative law*, 3rd Ed. Oxford 1998, pp. 43-47. With respect to the difficulties related to comparative law studies in arbitration, see R. Schütze, *Schiedsgerichtsbarkeit und Rechtsvergleichung*, 110 Zeitschrift für vergleichende Rechtswissenschaft (2011), pp. 89-90.

19 B. Burghardt, *Die Rechtsvergleichung in der völkerstrafrechtlichen Rechtsprechung*, in: S. Beck/C. Burchard/B. Fateh-Moghadam (Eds.), *Strafrechtsvergleichung als Problem und Lösung*, Baden-Baden 2011, pp. 236-237; K. Zweigert/H. Kötz, supra note 18, p. 8. Critical, A. Watts, *Enhancing the effectiveness of procedures of international dispute settlement*, 5 Max Planck Yearbook of United Nations Law (2001), p. 21 ('[Procedural q]uestions can in practice only be pursued on a tribunal-by-tribunal basis.').

The empirical approach faced several difficulties. Although an attempt at comprehensiveness was made, the breadth of the study and wealth of case law will have led to inadvertent, hopefully minor, omissions of relevant cases or aspects, especially as not all courts provide a central searchable database. Moreover, judgments tend to refer only sporadically, if at all, to *amicus curiae* participation and official case records are rarely accessible. Many aspects of *amicus curiae* participation are addressed only in the courts' correspondence, which is usually not publicly accessible.

A crucial initial challenge was the decision which international courts and tribunals to include in the study. Not all international courts and tribunals use the term *amicus curiae*. Moreover, definitions of the concept are numerous and diverging. The term *amicus curiae* is explicitly mentioned in the governing laws of the ICTY, the ICTR, in the ICC and the SCSL Rules of Procedure and Evidence, the IACtHR Rules of Procedure, and in numerous cases before the ECtHR, the IACtHR, the ICC, the ICTY, the ICTR, the SCSL, the STL, WTO panels, the WTO Appellate Body and investor-state arbitration tribunals. Some international courts and tribunals choose not to use the term to avoid connotations associated with any national legal concept. In 2011, the UNCITRAL Working Group II discussed whether the term should be used in its new rules on transparency. The Report of the 55th Session summarizes the discussions that led to the use of the term 'third party':

> It was said that that notion was well known in certain legal systems, where it was used in the context of court procedure. *Amicus curiae* participation in arbitral proceedings was said to be a more recent evolution. In order to provide rules that would be understood in the same manner in all legal systems, it was recommended to avoid any reference to the term "*amicus curiae*" and to use instead words such as "third party submission", "third party participation", or other terms with similar import. That proposal received support.[20]

This study relies on a functional approach to the term. Relying on shared characteristics of the concept before the international courts and tribunals reviewed, as will be detailed in Chapter 4, this study considers as *amicus curiae* all forms of participation where a non-party to the proceedings that has an interest in the proceedings or its outcome submits to the court for

20 Report of the UNCITRAL Working Group II (Arbitration and Conciliation on the Work of its fifty-fifth session), 55th Session, UN Doc. A/CN.9/736 (2011), para. 71 [Emphasis added].

its consideration information without a right to have the information accepted or considered.

C. Scope of the study

The definition of *amicus curiae* has led to the exclusion from this study of the following forms of non-party participation in international courts and tribunals: intervention, participation as of right by non-disputing member states to the treaty in dispute,[21] victim participation in the IACtHR pursuant to Article 25 IACtHR Rules, participation of the expert witness on the inter-American public order of human rights under Article 35 IACtHR Rules, participation by the national state of the applicant pursuant to Article 36(1) ECHR and participation by the Council of Europe Commissioner of Human Rights pursuant to Article 36(3) ECHR.[22] Often, the differences between these forms of participation and *amicus curiae* are only marginal and formal (see Chapter 4).

Participation by international organizations before the ICJ is more complex. Article 34(3) ICJ Statute in connection with Article 69(3) ICJ Rules empowers the ICJ to invite a public international organization whose constituent instrument or any other instrument adopted under it is in question to submit observations in writing. Article 43(2) and (3) ICJ Rules in connection with Article 69(2) ICJ Rules clarifies that in this case the public international organizations may submit observations *proprio motu* under the procedure established by Article 69(2) ICJ Statute. This form of participation was excluded from the study, because the ICJ is obliged to consider the submissions made, and functionally and historically, it relates to intervention pursuant to Article 63 ICJ Statute. However, Article 34(2) ICJ

21 See Article 5 UNCITRAL Rules on Transparency, Article 1128 NAFTA. See also the possibility of participation by the 'competent tax authorities' pursuant to Article 26(5)(b)(i) Energy Charter Treaty.

22 The provision was introduced upon request by the Council of Europe Commissioner for Human Rights. See Explanatory Note to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, ETS No. 194, Agreement of Madrid, 12 May 2009, paras. 86-87.

Statute was included in the study, because applicants for leave to participate as *amicus curiae* have invoked the provision as a legal basis. [23]

The book takes a pragmatic approach with respect to the selection of the international courts and tribunals to include in the study. In 2011, *De Brabandere* counted 22 international courts and 60 quasi-judicial, implementation control and other dispute settlement bodies.[24] It is obvious that this contribution cannot cover them all. Definitions of what constitutes an international court or tribunal vary.[25] This study considers as international courts all institutions established by international law, which are composed of independent judges and issue legally binding decisions based on law in proceedings involving as a party at least one state or intergovernmental organization.[26] The requirements of permanency of judges and predetermined procedural rules were dropped to include investor-state arbitration tribunals. Further, the WTO Appellate Body and panels have been included, although their reports become legally binding only upon adoption by negative consensus in the Dispute Settlement Body.[27] Essentially,

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23 M. Benzing, *Das Beweisrecht vor internationalen Gerichten und Schiedsgerichten in zwischenstaatlichen Streitigkeiten*, Heidelberg 2010, pp. 209-210. An obligation to submit requested information may be agreed to in a relationship agreement between the UN and the organization pursuant to Articles 57 and 63 UN Charter. *Benzing* refers to Article IX(1) Agreement between the UN and the ILO and Article IX(1) Agreement between the UN and the FAO.

24 E. De Brabandere, *Non-state actors in international dispute settlement: pragmatism in international law*, in: J. d'Aspremont (Ed.), *Participants in the international legal system: multiple perspectives on non-state actors in international law*, London et al. 2011, pp. 342-359.

25 C. Brown, *A common law of international adjudication*, Oxford 2007, pp. 10-11, with more references.

26 The definition proposed by *Romano* has gained some popularity. According to him, an international court is a permanent institution, which is composed of independent judges, adjudicates disputes between at least two entities at least one of which is a state or intergovernmental organization, operates on predetermined procedural rules, and issues legally binding decisions. C. Romano, *The international judiciary in context: a synoptic chart*, 2004, at: http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf (last visited: 28.9.2017). See also the similar definition by I. Brownlie, *Principles of public international law*, 6th Ed., Cambridge 2003, p. 676. See also C. P. Romano/K. J. Alter/Y. Shany, *Mapping international adjudicative bodies, the issues, and players*, in: C. P. Romano/K. J. Alter/Y. Shany (Eds.), *The Oxford handbook of international adjudication,* Oxford 2014, p. 5.

27 Cf. Articles 2(4), 16(4), 17(14) DSU. See for many, D. McRae, *What is the future of WTO dispute settlement?*, 7 Journal of International Economic Law (2004), p. 4.

this study includes judicial and quasi-judicial institutions that are usually considered international courts or 'quasi-courts' and that have *amicus curiae* practice.

A few words are necessary on investor-state arbitration.[28] The scope of this study does not permit a consideration of all of the approximately 3300 bilateral and multilateral investment treaty regimes.[29] Also because of the difficulties in obtaining information on the traditionally confidential investor-state arbitrations, the examination of investment disputes has been limited to cases with *amicus curiae* participation that were accessible through the websites of the ICSID, the PCA, the NAFTA and private investment arbitration databases such as italaw.com. Most of the cases considered were conducted under the institutional procedural rules of the ICSID or the UNCITRAL, which govern the majority of investor-state arbitrations.[30]

The definition excludes all *non-international* courts. *Amicus curiae* practice before national courts, though abundant, is addressed only to the extent it is necessary for the analysis of the concept before international courts and tribunals. The definition further excludes all international *non-courts*, such as monitoring and implementation control bodies.[31] Because

28 Investment treaties bestow a national from a state party to the treaty with the right to initiate binding arbitration against another state party (the 'host state') for an injury suffered by the national in relation to an investment due to a measure that is inconsistent with substantive obligations guaranteed in the treaty and for which the host state is liable. E. Levine, *Amicus curiae in international investment arbitration: the implications of an increase in third-party participation*, 29 Berkeley Journal of International Law (2011), p. 202.

29 UNCTAD, *IIA issues note, recent developments in investor-state dispute settlement*, No. 1, 2015, p. 2, at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (last visited: 28.9.2017); UNCTAD, Investment Policy Hub, at: http://investmentpolicyhub.unctad.org/IIA (last visited: 28.9.2017).

30 For the argument that investment arbitration is a system of international law, see S. Schill, *The multilateralization of international investment law*, Cambridge 2009.

31 E.g. UN Human Rights Council, Committee on the Elimination of Racial Discrimination, Committee Against Torture, Inter-American Commission on Human Rights, Inter-African Commission on Human and Peoples' Rights, and implementation monitoring bodies established by environmental agreements. See G. Rubagotti, *The role of NGOs before the United Nations Human Rights Committee*, in: T. Treves/M. Frigessi di Rattalma et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 67-92; L. Boisson de Chazournes, *The World Bank Inspection Panel: about public participation and dispute*

of their functional comparability to national labour courts, international administrative tribunals are also excluded.

Based on this approach, the following courts and tribunals were included in this study: the International Court of Justice, the International Tribunal for the Law of the Sea including its specialized Seabed Disputes Chamber, the European Court of Human Rights, the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights, the panels and Appellate Body of the World Trade Organization and investor-state arbitration tribunals including the Iran-United States Claims Tribunal. The scope of analysis covers both contentious and advisory proceedings.[32]

This selection does not claim to be comprehensive.[33] Notable is the exclusion of the Courts of the European Union and international and hybrid criminal courts and tribunals.

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settlement, in: T. Treves/M. Frigessi di Rattalma et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, pp. 187-203.

32 The advisory practice of the ECtHR is not considered. Article 47 ECHR endows the ECtHR with advisory jurisdiction for certain questions of interpretation of the ECHR and its Protocols. Rule 82 ECHR Rules subjects proceedings to Articles 47-49 ECHR, Chapter IX ECHR Rules and those provisions of the Rules the court considers 'appropriate'. Pursuant to Rule 84(2), contracting parties may submit written comments on the request. In its three advisory proceedings, the court has received written submissions from its member states. In two cases, it also received submissions from the Parliamentary Assembly. The ECtHR acknowledged the submissions, but it did not provide any legal justification for their admission. As an organ composed of representatives of national parliaments of the contracting states, the court may have considered it equivalent to member states' submissions. See *Decision on the Competence of the Court to give an advisory opinion*; *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008, para. 3; *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No. 2)* of 22 January 2010.

33 Inter-state arbitration is only referred to incidentally. So far, arbitral tribunals in two publicly known cases have received *amicus curiae* submissions: In the *Arctic Sunrise Arbitration,* the tribunal received (and rejected) a submission from Stichting Greenpeace Council. See *Arctic Sunrise Arbitration (the Kingdom of the Netherlands v. the Russian Federation),* Procedural Order No. 3 (Greenpeace International's Request to File an *Amicus Curiae* Submission) of 8 October 2014. In the *South China Sea Arbitration*, the Chinese (Taiwan) Society of International Law submitted an *amicus curiae* brief. The tribunal did not officially admit the brief. However, the brief is referenced in the portion of the award detailing non-

The exclusion of international and internationalized criminal courts and tribunals results from the realization that the scope of the study was too broad. Further, their purpose – the assertion of individual criminal liability – entails notable differences in their procedures, which, combined with the richness of their *amicus curiae* practice, warrants a separate study.[34]

The Courts of the European Union[35] are excluded from the scope of this study for another reason. The basic mandate of the ECJ is to ensure the uniform interpretation and application of primary and secondary EU law. With regard to the ECJ's own approach to its role, *Stein* argues that 'the Court has construed the European Community Treaties in a constitutional mode rather than employing the traditional international law methodology.'[36] This unique position somewhere between a national and an international court renders difficult a comparison of the procedural practices of the ECJ with other international courts.[37] In addition, the ECJ provides for other forms of non-party participation, limiting the need and likelihood of

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participating China's position. See *South China Sea Arbitration (Republic of the Philippines and the People's Republic of China), Award, 12 July 2016, PCA Case No. 2013-19* para. 449, FN 487. The parties held diverging views on the participation of *amici curiae*. While the Philippines saw it within the power of the tribunal to admit *amicus* briefs, China, in a letter to the tribunal, expressed its 'firm opposition' to *amicus curiae* submissions (and state intervention). *Id*., paras. 41, 42, 89.
For the EFTA Court, see J. Almqvist, *The accessibility of European Integration Courts from an NGO perspective*, in: T. Treves/M. Frigessi di Rattalma et al. (Eds.), *Civil society, international courts and compliance bodies*, The Hague 2005, p. 276. For individuals in the Mercosur system, see M. Haines-Ferrari, *Mercosur: individual access and the dispute settlement mechanism*, in: J. Cameron/ K. Campbell (Eds.), *Dispute resolution in the World Trade Organization*, London 1998, pp. 270-284. For *amicus curiae* before African human rights bodies, see F. Viljoen/A. K. Abebe, *Amicus curiae participation before regional human rights bodies in Africa*, 58 Journal of African Law (2014), pp. 22-44.

34 See S. Williams/H. Woolaver, *The role of amicus curiae before international criminal tribunals*, 6 International Criminal Law Review (2006), pp. 151-189.

35 Article 19(1) TEU determines that the Court of Justice of the European Union includes the European Court of Justice (hereinafter: ECJ), the General Court and specialized courts.

36 E. Stein, *Lawyers, judges and the making of a transnational constitution,* 75 American Journal of International Law (1981), p. 1. See also H. Rengeling/A. Middeke/M. Gellermann et al., *Handbuch des Rechtsschutzes in der Europäischen Union*, 3rd Ed., Munich 2014, p. 37, para. 2.

37 See T. Oppermann/C. Classen/M. Nettesheim, *Europarecht*, 5th Ed., Munich 2011, p. 67, para. 152; H. Rengeling/A. Middeke/M. Gellermann, supra note 36, p. 46, para. 17.

an introduction of *amicus curiae* participation.[38] Pursuant to Article 23 ECJ Statute, the parties to the national dispute that is referred, the European Commission (EC) and the EU member states have a right to submit written statements to the ECJ in cases where the validity or interpretation of an act is in dispute. Article 40 ECJ Statute permits intervention by member states in contentious proceedings. Further, the institute of the Advocate General serves to represent the public interest.[39] Despite the significant differences in terms of functions and rights, these forms of participation have prompted comparison with *amicus curiae*, because they can highlight aspects relevant for the interpretation of the provisions in dispute.[40]

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38 The concept is not unknown in European law. Article 15(3) *Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 TEU* grants the European Commission and the competition authorities of the member states a right to make written submissions as *amicus curiae* in national proceedings relating to the application of Articles 81 and 82. The modalities of participation were elaborated in Case C-429/07, *Belastingdienst/P/kantoor P v. X BV* [2009] and in the Opinion of Advocate General Mengozzi of 5 March 2009. The EC has relied on Article 15(3) to make submissions in seventeen cases so far, see http://ec.europa.eu/competition/court/antitrust_amicus_curiae.html (last visited: 28.9.2017). See also E. Barbier de La Serre/M. Lavedan, *Une leçon de la Cour sur l'ampleur de l'amitié: la Commission amicus curiae et les juridictions nationales*, 21 Révue Lamy de la Concurrence: droit, économie, régulation, pp. 68-71; R. Urlings, *De Commissie als amicus curiae en het fiscale karakter van een mededingingsboete*, Nederlands tijdschrift voor Europees recht (2009), pp. 288-293; P. Van Nuffel, *Ode an die Freu(n)de – the European Commission as amicus curiae before European and national courts*, in: I. Govaere/D. Hanf (Eds.), *Scrutinizing internal and external dimensions of European Law – liber amicorum Paul Demaret*, Vol. I, Brussels 2013, pp. 267-278. Arguing for an extension of third party participation to *amicus curiae* before the ECJ, E. Bergamini, *L'intervento amicus curiae: recenti evoluzioni di uno strumento di common law fra Unione europea e Corte europea dei diritti dell'uomo*, 42 Diritto communitario e degli scambi internazionali (2003), pp. 181, 186, 188.

39 The Advocate General represents the public and community interest in the form of 'reasoned submissions' written from the perspective of European law. See Article 252 TEU (ex Art. 222 EC). See also T. Oppermann/C. Classen/M. Nettesheim, supra note 37, p. 66, para. 143.

40 Case C-137/08, *VB Pénzügyi Lízing Zrt. V. Ferenc Schneider* [2010], closing argument of Advocate General Trstenjak of 6 July 2010, para. 80 (The arguments of member states submitted in proceedings before the ECJ are 'comparable to the submissions of an *amicus curiae* in so far as they are intended exclusively to support the Court of Justice in reaching a decision.' [References omitted].). See also

A final word concerning terminology seems appropriate due to the variety of terms used to describe *amicus curiae* participation. This contribution uses the terms *amicus curiae, amicus, amici curiae* and *amici*. The term 'international *amicus curiae*' is used to address *amici curiae* before international courts collectively. The use of the term '*amicus* intervention' is avoided. It confuses intervention and *amicus*. The term 'third party' will not be used as some international courts use it for different forms of non-party involvement.[41] The terms 'international courts and tribunals', 'courts and tribunals', 'international adjudication' and 'international dispute settlement' are used interchangeably.[42]

C. Chinkin, *Third parties in international law*, Oxford 1993, pp. 218-220; D. Shelton, *The participation of non-governmental organizations in international judicial proceedings*, 88 American Journal of International Law (1994), pp. 629-630; J. Almqvist, supra note 33, p. 278. See L. Brown/F. Jacobs, *The Court of Justice of the European Communities* 3rd Ed., London 1989, p. 55. This assessment overinflates *amicus curiae*. Unlike the Advocates General, *amici curiae* do not possess rights of participation in the proceedings.

41 Article 4 UNCITRAL Rules on Transparency; Articles 10, 17(4) DSU. See L. Mistelis, *Confidentiality and third party participation: UPS v. Canada and Methanex Corp. v. United States*, in: T. Weiler (Ed.), *International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law*, London 2005, p. 170 ('Parties not bound by the particular arbitration agreement and affected by the particular arbitration are referred to as third parties.').

42 On the differentiation between court and tribunal, see Y. Shany, *The competing jurisdictions of international courts and tribunals*, Oxford 2003, pp. 12-13, FN 44.